

No. 3443

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

JULIA WHITE CASTLE,
Plaintiff in Error,
vs.
WILLIAM R. CASTLE, LORRIN A.
THURSTON and ALFRED L.
CASTLE, Trustees under the Will
of JAMES BICKNELL CASTLE,
Deceased,
Defendants in Error.

No. 3443.
*In Error to
the
Supreme
Court
of Hawaii.*

PETITION FOR RE-HEARING

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii

A. G. M. ROBERTSON,
ALFRED L. CASTLE,
CLARENCE H. OLSON,
W. A. GREENWELL,
ARTHUR WITHINGTON,
Attorneys for Defendants in Error.

Filed this.....day of.....,
1919.

F. D. MONCKTON, Clerk,
By....., Deputy Clerk.

FILED

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Having carefully examined the opinion of the Honorable Court, we think that with propriety we may ask the court to consider whether this case be not one on which it will be proper to grant a rehearing to the defendants in error on the ground that—

1. The decree of the Supreme Court of the Territory of Hawaii was not a final judgment, which question is not passed upon in the opinion.

Coe v. Armour Fertilizing Works, 237 U. S. 412;

Bruce v. Tobin, 245 U. S. 18;

Winn v. Jackson, 12 Wheat. 135;

Moore v. Robbins, 18 Wall. 588;

District of Columbia v. McBlair, 124 U. S. 320;

Smith v. Adams, 130 U. S. 167;

Lodge v. Twell, 135 U. S. 232;

Haseltine v. Central Nat. Bank, 183 U. S.
130;

Louisiana Nav. Co. v. Commission, 226 U. S.
99.

2. The form of the decree finally determines its character.

Cases cited supra.

3. The decision of the Supreme Court was merely a ruling upon an interlocutory order in the partial distribution of the estate of J. B. Castle. The executors now have in their hands the \$18,302.75 subject to the further order of the probate court and the executors are not even parties hereto.

The order appealed from ended with this provision: "Jurisdiction is hereby retained to make and enter any other order or orders, decree or decrees from time to time upon the petition for allowance of accounts determining trust and distributing the estate." Transcript of Record, page 38. The probate court therefore retains jurisdiction to revoke the order from which an appeal was taken, and the decision of the Supreme Court of the Territory is merely a ruling of law passing upon an interlocutory order as provided by the statutes of the Territory.

Mix's Appeal, 35 Conn. 121, 95 Am. Decisions
222;

18 Cyc. 630, Note 51.

4. The question of dower in this case is not "very broad and clearly of a more general nature than are matters of local usages," as the common law dower never obtained in Hawaii and whether there is or is not dower depends entirely on the construction of a local statute which the territorial legislature may amend or repeal in determining how estates of its decedents shall be distributed.

5. The law is left in an uncertain state, as the court apparently decides "movable effects in possession or reducible to possession means all property not real estate," but does not overrule *Estate of Alexandre*, 19 Haw. 551, or *Ena Estate v. Ena*, 18 Haw. 588, which decide that there is property not real estate which is not subject to dower.

WHEREFORE, upon the foregoing ground defendants in error and petitioners respectfully pray this Honorable Court to grant to them a rehearing of said cause.

Dated, Honolulu, August 16, 1920.

A. G. M. ROBERTSON,
 ALFRED L. CASTLE,
 CLARENCE H. OLSON,
 W. A. GREENWELL,
 ARTHUR WITHINGTON,

Attorneys for Defendants in Error.

I, ARTHUR WITHINGTON, of counsel for the appellee herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

ARTHUR WITHINGTON.

